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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1237

RICHARD LEE WOLFE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 9, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals, per curiam, issued on December 9, 1970 (see Appendix A). The Order denying the Motion for Rehearing was entered on December 22, 1970 (see Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

Whether Petitioner's claim of privilege entered in a prosecution for violation of Section 176(a), Title 21, United States Code, should have been sustained, where compliance therewith would incriminate Petitioner under Texas law.

STATUTES INVOLVED

The statute involved is Section 176(a) of Title 21, United States Code.

STATEMENT OF THE CASE

The arrest in this case was made at Harlingen, Texas, and not at an international border.

Petitioner asserted his plea of privilege against self-incrimination to each of the offenses charged in this indictment. (R. 388 and S.F. 211 and 218) The Trial Court overruled the plea and entered judgment of conviction from which Petitioner appealed to the Circuit Court. (R. 400-401)

Leary v. United States, 89 S.Ct. 1532, held that a plea of privilege against self-incrimination asserted in a prosecution under Section 4744(a)(2), 4741 and 4742 of Title 26, United States Code, was a complete defense in a prosecution for non-compliance. The rationale of the decision rested on the fact that compliance with the statute would make a prima facie case of possession under Texas

law, Vernon's Texas Penal Code Annotated, Article 725(b), Section 23(1), 1957.

The same rationale applies in this case because Petitioner is compelled to "invoice" the marijuana in order to comply with Section 176(a). Compliance with this element of the offense renders the possession public and such declaration invites the Texas authorities to prosecute for possession of marijuana, as well as provides evidence to establish a prima facie case under the Texas law.

In two previous cases before the Circuit Court, the claim of privilege under the Fifth Amendment as applied to Section 176(a) of Title 21, was rejected. *Rule v. United States*, 362 F.2d 215 (5th Cir. 1966), cert. denied 385 U.S. 1018 (1967); *Haynes v. United States*, 339 F.2d 30 (5th Cir. 1964), cert. denied 380 U.S. 924 (1965).

The *Leary* decision now invites and compels a re-evaluation of the privilege as it may apply to the important statutes when they are enforced in a State and not at a border.

CONCLUSION

For the reasons given above, a Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD LEE WOLFE, *Petitioner*

By: Henry R. Carr

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1440 N.W. 14th Ave.
Miami, Florida 33125
(305) 635-1408

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 1971, a true copy of this Petition for a Writ of Certiorari was served upon the United States District Attorney for the Southern District of Texas.

Henry R. Carr

Henry R. Carr

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28893

Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RICHARD FREDERICK HOLSTEIN and
RICHARD LEE WOLFE,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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(December 9, 1970)

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* Rule 18, 5th Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, ____F.2d____, Part I [No. 29278, August 14, 1970].

Before BROWN, Chief Judge, MORGAN and INGRAHAM, Circuit Judges.

PER CURIAM: Appellants Richard Frederick Holstein and Richard Lee Wolfe were indicted on four counts involving the illegal importation of marijuana. The indictment charged appellants with the offenses of (1) conspiracy to smuggle, receive, conceal and transport a quantity of marijuana in violation of 21 U.S.C. §176a, (2) with smuggling, and (3) receiving twenty pounds of marijuana in violation of the same statute, and (4) failure to pay the transfer tax in violation of 26 U.S.C. §4744(a)(2).[1]

Holstein and Wolfe, having been convicted on the first three counts received sentences of seven and five years, respectively, on each count, the sentences to run concurrently.

The events were charged to have occurred on December 8, 1968, and the government's evidence tended to show the following: United States Customs Agents received information that Juan Alcarez of Matamoros, Mexico, was to consummate a large transaction involving the sale of marijuana. Agents saw Alcarez and appellants drive to the Matamoros residence of Alcarez' sister in a 1968 Oldsmobile. Subsequently codefendant Sergio Quintero arrived in a white 1969 Ford Galaxie and departed shortly thereafter. Appellants and Alcarez then returned to the latter's residence and later that afternoon drove to a parking lot and parked their car. After the trio left the parking lot, their movements were not observed. At 6:15 P.M., appellants ar-

[1] The fourth count was withdrawn from consideration by the jury.

rived in Brownsville at the Gateway International Bridge on foot. After being routinely processed and released by Customs Inspectors, appellants proceeded to the parking lot of an H.E.B. grocery store, where they contacted Quintero in the white 1969 Ford. Quintero and appellants were seen peering into the open trunk of the car. They then drove to Harlingen airport and appellant Holstein removed a suitcase from the trunk. The customs Agents then approached them, but all denied ownership of the suitcase and would not produce a key. The Agents smelled marijuana, opened the suitcase by force, and found twenty pounds of what appeared to be marijuana.

Appellants urge the following grounds for reversal: (1) the requirement that contraband be declared at the border violates their privilege against self-incrimination; (2) that the evidence was insufficient to prove that the marijuana was smuggled. Under their first point appellants assert that the invoicing procedures required by §176a are violative of the Fifth Amendment privilege against compulsory self-incrimination. They argue that compliance with the "invoice" procedure renders the possession public and invites Texas authorities to prosecute for possession. Appellants urge that *Leary v. United States*, 395 U.S. 6 (1969), requires a reevaluation of previous decisions of this court dealing with this issue. We find no merit in this contention, as it has been disposed of by this court in *Walden v. United States*, 417 F.2d 698 (5th Cir. 1970). Appellants' heavy reliance on *Leary* is unavailing. *United States v. Candanoza*, ___ F.2d ___ (5th Cir. 1970 [No. 28730, September 23, 1970, at 9]); *United States v. Hudson, et al*, ___ F.2d ___ (5th Cir. 1970 [No. 28237, September 10, 1970]).

Appellants next contend that the evidence of smuggling, unaided by the presumption struck down in *Leary*, is insufficient to support the verdict. Our perusal of the record indicates that there was ample circumstantial evidence from which the jury could have inferred guilt. Testimony revealed that appellants came from Florida and sought out Alcarez, a known dealer in marijuana, who arranged for the delivery of the contraband by his agent to appellants on the American side of the border. The *Leary* case does not forbid prosecution under §176a, nor invalidate convictions had without the use of the defective presumption. In the instant case there was ample direct and circumstantial evidence from which the jury could exclude every reasonable hypothesis but that of guilt and thus convict appellants without the aid of the presumption. See *United States v. Pruneda*, 425 F.2d 1289 (5th Cir. 1970).

The judgment of the district court is AFFIRMED.

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK
December 22, 1970

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130
(504) 527-6514

TO ALL PARTIES LISTED BELOW

Re: No. 28893—U. S. A. vs. Holstein and Wolfe

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By Frances Wolff
Deputy Clerk

cc: Mr. Thomas G. Sharpe, Jr.
Mr. Henry R. Carr
Mr. Anthony J. P. Farris

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1237

RICHARD LEE WOLFE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 6431

RICHARD FREDERICK HOLSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted on three counts charging, respectively,

conspiracy to smuggle and transport, smuggling, and receiving, marihuana, all in violation of 21 U.S.C. 176a. Petitioner Holstein was sentenced to concurrent seven-year prison terms; petitioner Wolfe received concurrent five-year terms. The court of appeals affirmed *per curiam* (Pets. App. A).

The sole contention advanced here by both petitioners is that the invoicing requirement of Section 176a violated petitioners' privilege against compulsory self-incrimination under the rationale of *Leary* v. *United States*, 395 U.S. 6. That claim has been consistently rejected. If the marihuana had been declared at the border, the confiscation would have occurred before it entered the United States. Thus, the claim that petitioners would have been forced to incriminate themselves under Texas law punishing possession of marihuana within the state is without merit. See, *e.g.*, *Witt* v. *United States*, 413 F. 2d 303 (C.A. 9), certiorari denied, 396 U.S. 932; *United States* v. *Reyes-Meza De Polanco*, 422 F. 2d 1304 (C.A. 9), certiorari denied, 397 U.S. 1081; *Walden* v. *United States*, 417 F. 2d 698 (C.A. 5); *United States* v. *Houle*, 428 F. 2d 816 (C.A. 5), certiorari denied, October 26, 1970 (No. 5576, this Term).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1971.

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